

IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1975

No. 75-1720

NEIL T. NAFTALIN,  
Petitioner,

vs.

UNITED STATES OF AMERICA,  
Respondent.

REPLY BRIEF IN SUPPORT OF  
PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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TO: THE HONORABLE, THE CHIEF JUSTICE AND  
ASSOCIATE JUSTICES OF THE SUPREME  
COURT OF THE UNITED STATES:

This reply brief is submitted pursuant  
to paragraph 4 of Rule 24, Rules of the  
Supreme Court, to address a point raised  
for the first time in the Memorandum for

the United States in Opposition to Naftalin's Petition for a Writ of Certiorari. The specific point raised was the fact that the United States has petitioned for a writ of certiorari in United States v. Lovasco, No. 75-1844.<sup>1</sup>

In Lovasco, the United States Court of Appeals for the Eighth Circuit affirmed the dismissal of a criminal indictment for a 17 month pre-indictment delay on the basis of an unreasonable delay coupled with ostensible prejudice. Lovasco was one of the cases cited by the Eighth Circuit in reversing the district court's dismissal of the indictment against Naftalin because of an outrageous 54 month pre-indictment delay.

We urge this Court to grant the petitions for writs of certiorari in both Lovasco and the instant matter. We believe

<sup>1</sup> United States v. Lovasco, 532 F2d. 59 (8th Cir. 1976).

it is necessary that both cases be considered by this Court so that the scope of defendants' rights under the Due Process Clause of the Fifth Amendment regarding pre-indictment delay can be delineated. It is especially important that both cases be reviewed by this Court in order to correct the inconsistent positions taken by the Eighth Circuit in Lovasco and Naftalin as well as in other cases<sup>2</sup> recently decided by that Court which were also cited in the Naftalin opinions. The vacillating rationale of the Eighth Circuit's decisions in those cases was discussed by Naftalin in his Petition for Rehearing In Banc which was included in the appendix to Naftalin's Supplement to Petition for a Writ of Certiorari which

<sup>2</sup> United States v. Barket, 530 F2d. 189 (8th Cir. 1976); and United States v. Jackson, 504 F2d. 337 (8th Cir. 1974); cert. denied, 420 U.S. 964 (1975).

was filed herein. (Supp. App. SA-6 to SA-11). The Eighth Circuit refused to reconcile its decisions by denying Naftalin's Petition for Rehearing In Banc.

The shifting sands upon which the Eighth Circuit's decisions have been built alone justifies this Court's granting of the petitions in both Naftalin and Lovasco. In addition, we believe that consideration of Naftalin's appeal by this Court is necessary to bring all of the issues involved in pre-indictment delay into focus to facilitate a full and final explication of the law on this vital question.

The primary issue presented in the Lovasco petition is whether this Court in United States v. Marion, 404 U.S. 307, 324-25 (1971), intended to establish a two-part conjunctive test for due process relief from pre-indictment delay or simply a disjunctive list of alternative theories.

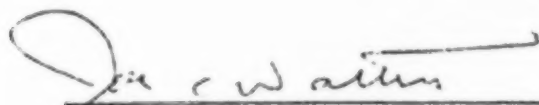
- The two elements specified in Marion were:  
(1) substantial prejudice to the accused's right to a fair trial, and (2) governmental misconduct in the form of tactical delay. This issue is also squarely presented in Naftalin's petition.

If this Court determines to grant certiorari in Lovasco, it should also grant certiorari in the instant matter so that the Court can define a key ingredient of the Marion formulation - substantial prejudice to the accused's right to a fair trial. Naftalin, in addition to providing an opportunity to define the meaning of this ingredient, presents the question of whether substantial prejudice to the accused's right to a fair trial should be presumed where the government, under the facts and circumstances in this case, has delayed indictment for 54 months after being armed



with all the evidence necessary for an indictment based upon the accused's admissions to the government.

Respectfully submitted,

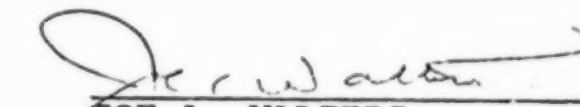
  
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CERTIFICATE OF SERVICE

I, JOE A. WALTERS, one of the attorneys for the Petitioner, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 14th day of September, 1976, I served three copies of the foregoing Reply Brief in Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit upon Respondent by depositing the same in the United States air mail, postage prepaid, and addressed to Respondent's attorney of record, Robert H. Bork, Solicitor General, Department of Justice, Washington, D.C. 20530.

  
JOE A. WALTERS